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HARVARD
LAW REVIEW.

VOL. IV. FEBRUARY 15, 1891. NO. 7.

# THE DOCTRINE OF PRICE *v.* NEAL.

THE plaintiff in this prominent case[1] was the drawee of a bill of exchange; the defendant was an indorsee for value in due course. The bill was paid on presentment, the drawee and holder being alike ignorant that the signature of the ostensible drawer was forged. Upon discovery of the forgery the plaintiff sought to recover the money on the ground that it had been paid under a mistake. But the Court of King's Bench gave judgment for the defendant, Lord Mansfield delivering the opinion.

The rule established by Price *v.* Neal, that a drawee pays (or accepts) at his peril a bill, on which the drawer's signature is forged, has been repeatedly recognized both in England and the United States.[2] The same rule prevails in Scotland[3] and on the continent

[1] 3 Burr. 1354; 1 W. Bl. 390, S. C. This case, as well as most of those discussed in this paper, will be found in Professor Keener's valuable collection of Cases on Quasi-Contracts.

[2] Smith *v.* Mercer, 6 Taunt. 76; Cocks *v.* Masterman, 9 B. & C. 902; Hoffman *v.* Milwaukee Bank, 12 Wall. 181; Young *v.* Lehman, 63 Ala. 519, 523; First Bank *v.* Ricker, 71 Ill. 439, 441; Nat. Bank *v.* Tappan, 6 Kas. 456; Comm. Bank *v.* First Bank, 30 Md. 11; Hardy *v.* Chesapeake Bank, 51 Md. 562, 585; Nat. Bank *v.* Bangs, 106 Mass. 441, 444; Danvers Bank *v.* Salem Bank, 151 Mass. 280, 282; Bernheimer *v.* Marshall, 2 Minn. 78; Stout *v.* Benoist, 39 Mo. 277, 299; Ins. Co. *v.* Bank, 60 N. H. 442, 446; Weisser *v.* Dennison, 10 N. Y. 68, 75; Park Bank *v.* Ninth Bank, 46 N. Y. 77; Salt Bank *v.* Syracuse Inst., 62 Barb. 101; Hagen *v.* Bowery Bank, 64 Barb. 197; Nat. Bank *v.* Grocers' Bank, 2 Daly, 289; Ellis *v.* Ohio Co., 4 Oh. St. 628, 652; Levy *v.* U. S. Bank, 1 Binn. 36; People's Bank *v.* Franklin Bank, 88 Tenn. 299; City Bank *v.* Nat. Bank, 45 Tex. 203, 218; Rouvant *v.* San Antonio Bank, 63 Tex. 610; Bank of St. Albans *v.* Farmers' Bank, 10 Vt. 141; Johnson *v.* Bank, 27 W. Va. 343, 348, 359; Ryan *v.* Bank, 12 Ont. R. 39.

The ill-considered case, McKleroy *v.* Southern Bank, 14 La. An. 458, is a solitary

[3] Clydesdale Bank *v.* Royal Bank (Court of Sess., March 11, 1876).

of Europe.[1] Unfortunately, there is not a similar unanimity as to the reason of the rule. The drawee's inability to recover the money paid is often referred to his supposed negligence. He ought, it is said, to know the signature of the drawer. Against this view two sufficient objections may be urged. In the first place, negligence on the part of the payor is not, in general, a bar to the recovery of money paid under a mistake.[2] If, for instance, a creditor receives payment of a debt, which has already been paid, although he may have received the money in good faith, and the debtor may have paid in careless forgetfulness of the prior payment, it is obviously unjust for the creditor to retain the second payment, and thereby enrich himself at the expense of the debtor. Secondly, if the drawee's negligence were the test, he ought to be allowed to show, in a given case, that he was not negligent; for example, that the forgery was so skilfully executed as naturally to deceive him. But such evidence would not be received. "If the bank pays money on a forged check, no matter under what circumstances of caution, or however honest the belief in its genuineness, if the depositor himself be free from blame and has done nothing to mislead the bank, all the loss must be borne by the bank, for it acts at its peril." [3]

Another so-called explanation of the rule, that the drawee pays a forged bill at his peril, has obtained great currency; namely, that the drawee is "conclusively presumed to know," or is "estopped to deny," the signature of the drawer. These expressions are repeated by text-writer and judge, apparently without a suspicion of their worthlessness as an explanation of the rule in question. Yet to one asking why the drawee pays at his peril, it is no sufficient answer to say, that the drawee is conclusively presumed to

decision to the contrary effect. But this case, though not cited, is virtually overruled by Howard *v.* Mississippi Bank, 28 La. An. 727. By statute, in Pennsylvania, the holder must refund to the drawee in cases like Price *v.* Neal. Corn Bank *v.* Bank of Republic, 78 Pa. 233. In Goddard *v.* Merchants' Bank, 4 N. Y. 147, a payor for honor was allowed to recover the money paid to the holder, on the ground that he paid without first inspecting the bill. Two judges dissented, and their views were followed in Bernheimer *v.* Marshall, 2 Minn. 78; Johnston *v.* Bank, 27 W. Va. 343 (see also Leather *v.* Simpson, 11 Eq. 398, 403). In Wilkinson *v.* Johnston, 3 B. & C. 428, a payor for honor was allowed to recover, his position being thought distinguishable from that of a drawee. Such a distinction seems ill-founded in reason, is opposed to the continental law, and was disclaimed in Goddard *v.* Merchants' Bank, *supra*. The case is, at least, of doubtful authority. Chalmers, Bills of Exch. (3 ed.) 196.

[1] 2 Pardessus, Cours de Droit Commercial (3 ed.), § 501; Wächter, Wechselrecht, 482.

[2] Kelly *v.* Solari, 9 M. & W. 54; Appleton Bank *v.* McGilvray, 4 Gray, 518.

[3] Per Alvey, J., in Hardy *v.* Chesapeake Bank, 51 Md. 562, 585.

know the drawer's signature. A conclusive presumption of the drawee's knowledge means simply that his ignorance, whether culpable or excusable, is an irrelevant fact. The question, therefore, immediately recurs: Why is the drawee's excusable ignorance an irrelevant fact?[1]

The holder's right to retain the money paid him by the drawee has sometimes been placed upon the ground, that, in consequence of the payment, he has lost the right of recourse against prior indorsers, which he would have had, in case the bill had been dishonored. There seems to be great force in this argument. But, if the holder's right of retention were founded solely upon this argument, it would follow that in cases where there were no prior indorsers, he would have to refund the money to the drawee. But the decisions show that the drawee pays at his peril in these cases also.[2] The holder's right to retain the money must depend, therefore, upon a more comprehensive principle than that of the loss of rights against prior indorsers.

The true principle, it is submitted, upon which cases like Price *v.* Neal are to be supported, is that far-reaching principle of natural justice, that as between two persons having equal equities, one of whom must suffer, the legal title shall prevail. The holder of the bill of exchange paid away his money when he bought it; the drawee parted with his money when he took up the bill. Each paid in the belief that the bill was genuine. In point of natural justice they are equally meritorious. But the holder has the legal title to the money. A court of equity (and the action of assumpsit for money had and received is, in substance, a bill in equity) cannot properly interfere to compel the holder to surrender his legal advantage. The same reasoning applies if the drawee has merely accepted the bill. The legal title to the acceptance is in the holder. A court of equity ought not to restrain the holder by injunction from enforcing his legal right, nor should a court of law permit the acceptor to defeat his acceptance by an equitable defence.

Lord Mansfield, in Price *v.* Neal, considered, it is true, the ques-

[1] If there were in truth any such conclusive presumption of the drawee's knowledge, a drawee who *purchased* instead of paying a forged bill ought not to recover his purchase-money; but a recovery is allowed. Fuller *v.* Smith, 1 C. & P. 197; Ry. & M. 49, S. C.

[2] Howard *v.* Mississippi Bank, 28 La. An. 727; Commercial Bank *v.* First Bank, 30 Md. 11; Salt Bank *v.* Syracuse Inst., 62 Barb. 101; Levy *v.* U. S. Bank, 1 Binn. 27; Bank of St. Albans *v.* Farmers' Bank, 10 Vt. 141; Johnston *v.* Bank, 27 W. Va. 343.

tion of the drawee's negligence, but it is evident, from the following extracts, that he based his opinion chiefly upon the principle just stated: —

It is an action upon the case for money had and received to the plaintiff's use; in which action the plaintiff cannot recover the money unless it be *against conscience* in the defendant to retain it. But it can never be thought unconscientious in the defendant to retain this money, when he has once received it upon a bill of exchange, indorsed to him for a fair and valuable consideration, which he had *bona fide* paid, without the least privity or suspicion of any forgery. . . . If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man.[1]

If, indeed, the equities are not equal, — if, for instance, the holder acquired the bill, not in the course of business, but as a gift, — he ought not to be permitted to retain the money paid him by the drawee. This is not a case where one of two innocent persons must suffer a loss in any event. If the money is repaid, neither will suffer a loss. For the holder, although he refund, is not really out of pocket. By refusing to repay, he would be striving unconscientiously to enrich himself by a positive increase of his property at the expense of the drawee.

Again, the equities might be unequal because of the holder's misconduct. He might have purchased the bill from a stranger, making no inquiries as to his identity or character. Inasmuch as such inquiries would ordinarily disclose the fraud, if any, and prevent its success, the holder, who thus carelessly fails to satisfy himself as to the identity and honesty of his transferrer, may fairly be held responsible for the consequent loss, which must fall either on the drawee or himself. The general principle and this limitation are forcibly stated by Ranney, J.: —

We have nowhere doubted the wisdom or policy of the rule, which allows an innocent holder to require the drawee to pass upon the signature of the drawer, and makes him responsible for the decision he makes; nor the justice of permitting the former to retain the money received upon a forgery when some one must suffer by the mistake. But we must be better informed than at present, before we shall be able to perceive the justice or propriety of permitting a holder to profit by a mistake which his

[1] The same principle is stated in Commercial Bank *v.* First Bank, 30 Md. 11, 22; Gloucester Bank *v.* Salem Bank, 17 Mass. 42; Bernheimer *v.* Marshall, 2 Minn. 78, 83.

own negligent disregard of duty has contributed to induce the drawee to commit.[1]

So, also, a holder who acquired the bill in good faith and with due care, but afterwards discovered or suspected the forgery, could not honestly collect the bill, and if he should collect it, would be bound to refund the money.[2]

The generally received rule, that the drawee pays or accepts a forged bill at his peril, has nevertheless been assailed by the distinguished author of a very successful book. Mr. Daniel, in his treatise on Negotiable Paper,[3] maintains that a drawee, who pays or accepts a forged bill, should be permitted to recover the money paid or to resist his acceptance, for the reason that the holder, who presents a bill to the drawee for payment or acceptance, "represents, in effect, to the drawee, that he holds the bill of the drawer, and demands its acceptance or payment, as such. If he indorses it, he warrants its genuineness; and his own assertion of ownership is a warranty of genuineness in itself." But, with all deference, this criticism, and the similar criticism of Mr. Justice Chambre in his dissenting opinion in Smith *v.* Mercer,[4] spring from a false analogy. One who transfers a bill or any chattel, whether by way of sale or in payment of a debt, does indeed represent that the thing sold or exchanged is his, and also what it purports to be. To use the common expression, he impliedly warrants his title and the genuineness of the thing transferred. Accordingly, if it is not genuine, the vendee may recover his purchase-money, or the creditor may treat his debt as still unpaid.[5]

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[1] Ellis *v.* Ohio Co., 4 Oh. St. 628, 668. See to the same effect Nat. Bank *v.* Bangs, 106 Mass. 441; Danvers Bank *v.* Salem Bank, 151 Mass. 280; People's Bank *v.* Franklin Bank, 88 Tenn. 299; Rouvant *v.* San Antonio Bank, 63 Tex. 610. The French law is the same. 2 Pardessus, Cours de Droit Comm. (3 ed.) § 505; 2 Bédarride, Lettre de Change (2 ed.), § 377.

But see *contra*, Howard *v.* Mississippi Bank, 28 La. An. 727; Comm. Bank *v.* First Bank, 30 Md. 11; Salt Bank *v.* Syracuse Inst., 62 Barb. 101; St. Albans Bank *v.* Farmers' Bank, 10 Vt. 141. It would not be surprising if these last four cases should not be followed even in the jurisdictions in which they were decided.

[2] First Bank *v.* Ricker, 71 Ill. 439; Nat. Bk. *v.* Bangs, 106 Mass. 441, 444–5. For like decisions in analogous cases see Martin *v.* Morgan, 3 Moore, 635; City Bank *v.* Burns, 68 Ala. 267 (*semble*); Peterson *v.* Union Bank, 52 Pa. 206. See also Whistler *v.* Foster, 14 C. B. N. S. 340.

[3] Vol. II. (3d ed.) § 1361.

[4] 6 Taunt. 76.

[5] Jones *v.* Ryde, 5 Taunt. 488; Young *v.* Cole, 3 Bing. N. C. 724; Gurney *v.* Womersley, 4 E. & B. 133; 2 Ames, Cas. B. & N. 242, n. 1, 633, n. 1.

But the attitude of the holder of a bill who presents it for payment is altogether different from that of a vendor. The holder is not a bargainor. By presentment for payment he does not assert, expressly or by implication, that the bill is his or that it is genuine. He, in effect, says: "Here is a bill, which has come to me, calling by its tenor for payment by you. I accordingly present it to you for payment, that I may either get the money, or protest it for non-payment." Mr. Justice Chambre's statement, that the holder warrants the genuineness of the bill by presenting it, was expressly repudiated by Littledale and Bayley, JJ., in E. I. Co. *v.* Tritton.[1] The notion, that the holder's indorsement of his name on the bill at the time of payment is a warranty of the genuineness of the bill, although not without judicial sanction,[2] should be strenuously resisted. The so-called indorsement is not an indorsement at all, but simply a receipt of payment.[3]

Wherever Price *v.* Neal is recognized as law, we should expect to find that one who paid a bill or note on which his own name was forged could not recover the money from an innocent holder for value. The authorities, with a single exception, permit the holder to retain the money.[4]

In order to test the soundness of the principle upon which Lord

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[1] 3 B. & C. 289, 290–1. See to the same effect Wilkinson *v.* Johnston, 3 B. & C. 428, 436; Bernheimer *v.* Marshall, 2 Minn. 78, 84; Bank of St. Albans *v.* Farmers' Bank, 10 Vt. 141, 146–7. The distinction between a sale and a payment of a bill is pointedly taken in Corn Bank *v.* Nassau, 91 N. Y. 74, 80.

[2] Nat. Bank *v.* Bangs, 106 Mass. 441; People's Bank *v.* Franklin Bank, 88 Tenn. 299.

[3] See Story, Prom. Notes (7th ed.), 526, n. 5.

[4] Mather *v.* Maidstone, 18 C. B. 273; Young *v.* Lehman, 63 Ala. 519, 523; Tyler *v.* Bailey, 71 Ill. 34, 37; Allen *v.* Sharpe, 37 Ind. 67, 73; Third Bank *v.* Allen, 59 Mo. 310, 315; Lewis *v.* White's Bank, 27 Hun, 396; Johnston *v.* Bank, 27 W. Va. 343; Banca Nazionale *v.* Giacobini, Cassaz. di Torino (1871), cited in Famone, Il Codice Civile, 454–5; 2 Pardessus, Cours de Dr. Comm. (3d ed.), § 505; 2 Bédarride, Lettre de Change (2d ed.), § 380. See also Bank of U. S. *v.* Bank of Ga., 10 Wheat. 333; Cook *v.* U. S., 91 U. S. 389, 396–7; Gloucester Bank *v.* Salem Bank, 17 Mass. 33. The exceptional case *contra*, Welch *v.* Goodwin, 123 Mass. 71, is not to be supported. It was decided almost wholly upon the authority of Carpenter *v.* Northborough Bank, 123 Mass. 66, which was a totally different case. In this last case, the plaintiff made a note payable to A, and gave it to B for the latter's accommodation, upon the understanding that A should also indorse for B's accommodation. B forged A's name as indorser and discounted the note with the defendant, to whom the plaintiff paid it when due. The title of the note obviously never passed from the plaintiff. The defendant, therefore, obtaining the money by the wrongful use of the plaintiff's property, must hold the money as a constructive trustee for the plaintiff, who accordingly rightly recovered it from the defendant. Talbot *v.* Rochester Bank, 1 Hill, 295; Arnold *v.* Cheque Bank, 1 C. P. D. 578, were similar cases.

Mansfield proceeded in Price *v.* Neal, it will be well to consider some analogous cases clearly within his principle, but to which the reasons commonly assigned for the decision in that case are inapplicable.

The case of Leather *v.* Simpson [1] is especially valuable for our present purpose. The defendant had discounted for the drawer certain bills of exchange, to which bills of lading were attached. The plaintiff, the drawee of the bills of exchange, paid them to the defendant on the faith of the bills of lading. The bills of lading turned out to be forged. The plaintiffs then sought to recover the money as money paid by mistake, but failed. There was, confessedly, no actual negligence in the case. No one will assert that the drawer was conclusively presumed to know the captain's signature to the bills of lading. The defendant gave up no rights against prior indorsers, for there were none. The gist of the opinion of Malins, V. C., is thus stated by him: —

> The equities between these parties are equal; the parties are equally innocent in the transaction; they have all been imposed upon; but there is this difference, that one of them, by the course of the transaction, has been in possession of the money, and I am at a loss to see any ground upon which I can be justified in making a decree that that money should be returned.

The Vice-Chancellor in this case, and Lord Denman in the similar case of Robinson *v.* Reynolds,[2] where the drawee was compelled to pay his acceptance, repudiated the drawee's claim that the holder, by presenting the bills of exchange with the bills of lading attached, warranted the genuineness of the latter.[3] The decisions in this country accord with Leather *v.* Simpson and Robinson *v.* Reynolds.[4]

The principle that, when a loss must fall upon one of two in-

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[1] 11 Eq. 398. [2] 2 Q. B. 196.

[3] Baxter *v.* Chapman, 29 L. T. Rep. 642; Goetz *v.* Bank, 119 U. S. 551, *accord.*

[4] Goetz *v.* Bank, 119 U. S. 551; Hoffman *v.* Bank of Milwaukee, 12 Wall. 181; Young *v.* Lehman, 63 Ala. 519; First Bank *v.* Burnham, 32 Mich. 323; Craig *v.* Sibbett, 15 Pa. 240; Randolph *v.* Merchants' Bank, 7 Baxt. 456. In the Michigan case, Cooley, J., said: "The best view that can be taken of this case for the plaintiffs below is, that there was a mutual mistake of fact under which the bank discounted and the drawees paid the bill. Conceding this, why should the drawees be allowed to transfer the loss to the bank? Usually when one of two parties, equally innocent, must suffer, the law leaves the loss where it has chanced to fall."

nocent parties having equal equities, the one who has the legal title will prevail, is conspicuously illustrated by another class of cases strongly resembling the one just considered. Aiken *v.* Short,[1] Heurtematte *v.* Morris,[2] Fort Dearborn Bank *v.* Carter,[3] Southwick *v.* First Bank,[4] and the like, decide, that the payee of an order or bill of exchange, who takes the same either by way of purchase or on account of a debt due to him from the drawer, and who afterwards procures its acceptance or payment by the drawee, may enforce the acceptance or keep the money, although the drawee was induced to accept or pay by the fraudulent representations of the drawer. This doctrine is a familiar one in the continental law.[5] Duranton first considers the case where the payee was a creditor of the drawer, and remarks that the "Roman law not only denied the drawee's right to recall what he had paid on his acceptance, although induced by mistake, but also allowed him no defence to an action upon his promise, and that, too, although he accepted in consequence of the fraud and chicanery of the drawer." He then points out that if the payee were a volunteer he could not keep the money or enforce the promise, because in such a case "the payee is not fighting to avoid a loss, but rather to make a profit, and the drawee, on the other hand, is fighting to avoid a loss. . . . Whereas, when the payee is a creditor of the drawer, *versaretur in damno*, if the drawee could refuse to perform his promise or could recall his payment."

In like manner the assignee of a chose in action, who acquires it by purchase or on account of a debt due him from the obligee, and who collects the claim from the obligor, may keep what he has got, although the obligor paid in ignorance of the fact that he had a valid defence to the enforcement of the claim; *e.g.*, fraud,[6] illegality,[7] failure of consideration,[8] payment,[9] set-off,[10] and the like.

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[1] 1 H. & N. 210; Walker *v.* Conant, 69 Mich. 321, *accord.* [2] 101 N. Y. 63.

[3] 152 Mass. —, 25 N. E. Rep. 27. [4] 84 N. Y. 420.

[5] 12 Duranton, Cours de Droit Français, § 332; Gide, Novation, 421; Erxleben, Condictiones sine Causa, 156 *et seq.*; 3 Endemann, Handbuch d. Handels-, See- und Wechselrechts, 1102, 1115.

[6] Merchants' Co. *v.* Abbott, 131 Mass. 397.

[7] Atty.-Gen. *v.* Perry, Comyns, 481, is *contra*. But this case is not likely to be followed, unless as a revenue decision.

[8] Youmans *v.* Edgerton, 91 N. Y. 403.

[9] Mar *v.* Callander, Mor. Dict. 2927; Ker *v.* Rutherford, Mor. Dict. 2928; Duke *v.* Halcraig, Mor. Dict. 2929.

[10] Franklin Bank *v.* Raymond, 3 Wend. 69, citing Price *v.* Neal.

The case of Merchants' Co. *v.* Abbott is a typical one. Certain buildings, insured in the plaintiff company, were set on fire by the owner and destroyed. The owner then assigned the policy of insurance to the defendant, to whom the plaintiff paid the amount of the adjusted loss, both parties being ignorant of the owner's fraud. The defendant was allowed to keep the money. In Mar *v.* Callander, a creditor, who had been paid by the debtor's chamberlain, assigned his debt to the defendant; a new chamberlain, who was ignorant of the payment by his predecessor, paid the debt to the defendant. Here, too, the defendant prevailed.

Consistently with the cases hitherto considered, if a drawee pays a bill of exchange, erroneously supposing that the amount to the credit of the drawer is sufficient to meet the bill, he ought not, upon discovering his mistake, to recover the money paid from the holder. Such is the law in England and several of our States.[1] In Chambers *v.* Miller, the mistake was discovered while the holder was still at the bank-counter; but the court held that the money was irrevocably his. In Massachusetts, if not also in New York, the holder is not permitted to keep the money, unless he has changed his position before notice of the mistake.[2] The decisions in those States, it is submitted, are inequitable. Either the holder or drawee must suffer by the misconduct of the drawer in drawing without funds. If the holder has once got the money, there seems to be no reason why a court should take it from him. Furthermore, it seems impossible to reconcile these decisions with those discussed in the preceding two paragraphs and decided in the same jurisdictions. In Fort Dearborn Bank *v.* Carter,[3] the court was evidently embarrassed by its decisions in favor of the drawee

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[1] Davies *v.* Watson, 2 Nev. & M. 709; Chambers *v.* Miller, 13 C. B. N. S. 125; Woodland *v.* Fear, 7 E. & B. 519, 521; Pollard *v.* Bank of England, L. R. 6 Q. B. 623; Nat. Bank *v.* Burkhardt, 100 U. S. 686; Preston *v.* Canadian Bank, 23 Fed. Rep. 179; City Bank *v.* Burns, 68 Ala. 267; Nat. Bank *v.* McDonald, 51 Cal. 64 (*semble*); First Bank *v.* Devenish (Colo., 1890), 25 Pac. R. 177; Peterson *v.* Union Bank, 52 Pa. 206; Hull *v.* Bank, Dudley (S. Ca.), 259. So in Germany. Postfiscus *v.* Imhof (Reichs-Gericht, 1889), 44 Seuffert's Archiv, No. 257; Anon. (O. L. G., Hamburg, 1887), 43 Seuffert's Archiv, No. 212.

[2] Merchants' Bank *v.* Eagle Bank, 101 Mass. 251; Merchants' Bank *v.* Nat. Bank, 139 Mass. 513 (but see Boylston Bank *v.* Richardson, 101 Mass. 287); Troy Bank *v.* Grant, Hill & D. 119; Irving Bank *v.* Wetherald, 36 N. Y. 335; Whiting *v.* City Bank, 77 N. Y. 363 (*semble*); Nat. Bank *v.* Steele, 11 N. Y. Sup. 538 (but see Oddie *v.* Nat. Bank, 45 N. Y. 735).

[3] 152 Mass. —, 25 N. E. Rep. 27.

who paid, by mistake, overdrafts. They were disposed of as follows: —

Whatever may be the distinction between such a case as Merchants' Bank *v.* Nat. Bank [1] (the case of an overdraft paid by mistake), and the case of Ins. Co. *v.* Abbott,[2] it is manifest the making of a contract or the payment of money under a mistake of fact, as these words are used in the law, is not always followed by the same consequences as the making of a contract or the payment of money in consequence of the fraudulent misrepresentation of a third person.

This can hardly be regarded as the court's last word upon the subject. It is believed that no convincing reason can be found for discriminating, as the Massachusetts and New York courts do, against a drawee, who has been misled by the fraud of the drawer, and in favor of a drawee, who has acted under a mistake.

One who believes in Lord Mansfield's principle that, when one of two innocent persons must suffer by the misconduct of a third, the loss should lie where it has fallen, is destined to disappointment, as he reads the American cases bearing upon the right of the holder, to whom the drawee has paid a bill, which has been altered after its issue by the drawer. If a holder has in good faith purchased a bill, of which the amount has been raised, and the drawee has in like good faith paid it, the payment, it would seem, should have the same effect in favor of the holder, as the payment of a bill on which the drawer's name is forged, or the payment of a bill on the faith of forged bills of lading, or the payment of a bill induced by the drawer's fraud, or of one drawn without funds. Nevertheless, the right of the drawee to recover the money paid upon an altered bill is asserted by many decisions in this country.[3] One who disagrees with these decisions must turn for comfort to the English and continental law. There is, it is true, no express English decision recognizing the holder's right to keep the money paid in such a case, but that the holder need not refund, seems to be a fair inference from Langton *v.* Lazarus.[4] In France, Germany,

[1] 139 Mass. 513. [2] 131 Mass. 397.

[3] Espy *v.* Bank, 18 Wall. 604; Young *v.* Lehman, 63 Ala. 519, 523; Redington *v.* Woods, 45 Cal. 406; Park *v.* Roser, 67 Ind. 500; Merchants' Bank *v.* Exchange Bank, 16 La. 457; Third Bank *v.* Allen, 59 Mo. 310; Bank of Commerce *v.* Union Bank, 3 N. Y. 230; Bank of Commerce *v.* Nat. Association, 55 N. Y. 211; Marine Bank *v.* Nat. Bank, 59 N. Y. 7; White *v.* Continental Bank, 64 N. Y. 316; Security Bank *v.* Bank of Republic, 67 N. Y. 458; Nat. Bank *v.* Westcott, 89 N. Y. 418; Nat. Bank *v.* Seaboard Bank, 114 N. Y. 28 (*semble*); City Bank *v.* Nat. Bank, 45 Tex. 203.

[4] 5 M. & W. 629.

Belgium, Switzerland, Italy, Hungary, and Russia it is unquestioned law, that a drawee, who accepts or pays an altered bill, must honor his acceptance, and cannot recover what he has paid.[1]

Upon whom finally should the loss fall, when a party to a bill or note pays it to a holder, who could maintain no action against the payor, because one of the indorsements in his chain of title is a forgery? Here, too, it may be urged, the equities are equal, and the holder, having obtained the money, should keep it. But this case differs in an important particular from all the cases hitherto considered, and another principle comes into play, which overrides the rule as to equal equities. In all the other cases the bill or note, however valueless it may have been, belonged to the holder. In the case of the forged indorsement, on the other hand, the bill or note belongs, not to the holder, but to him whose name was forged as indorser. The holder, who bought the bill, was therefore guilty of a conversion, however honestly he may have acted. When he collected the bill, inasmuch as he obtained the money by means of the true owner's property, he became a constructive trustee of the money for the benefit of the latter. The true owner may therefore recover the money as money had and received to his use.[2] If he recovers in his action, the property in the bill would pass to the holder; but the bill would be of no value to him, for, if he should seek to collect it, he would be met with the defence that it had been paid to him once already. If, on the other hand, the true owner prefers to proceed on the bill against the maker or acceptor, he may do so, and the prior payment to the holder, being made to one without title, will be no bar to the action. The maker or acceptor, however, who pays to the true owner, is entitled to the bill, and should be subrogated to the owner's right to enforce the constructive trust against the holder, and could thereby make himself whole. Consequently, whatever course the true owner elects to pursue, the loss must ultimately fall on the holder. As a matter of positive law, the maker or acceptor, who pays the holder claiming under a forged indorsement, is allowed to proceed against the latter directly, without first paying the true owner.[3] This, as a matter of

[1] 1 Nouguier, Lettre de Change (4 ed.), § 325; 2 Pardessus, Cours de Dr. Comm. (3 ed.), § 506; Wächter, Wechselrecht, 481, giving the text of the commercial codes of the countries above mentioned.

[2] Bobbett *v.* Pinkett, 1 Ex. Div. 368, 372; Indiana Bank *v.* Holtsclaw, 98 Ind. 85; Buckley *v.* Second Bank, 35 N. J. 400; Johnson *v.* First Bank, 6 Hun, 124.

[3] 1 Ames Cas. on B. & N. 433, n. 2; Star Co. *v.* N. H. Bank, 60 N. H. 442; Corn

legal reasoning, is believed to be unwarranted. But as, in the result, the loss comes, where upon the principle of subrogation it ought to come, it is not worth while to be too critical.

The principle by which, in a controversy between two persons having equal equities, the holder of the title shall prevail, is most commonly applied for the benefit of a purchaser, who buys a title, without notice of equities attaching to it, in the hands of the seller, in favor of a third person.[1] There is, it must be admitted, one difference between this case of the purchaser and those already discussed, in which the holder of a bill received and the drawee made payment, both acting under the mistaken belief that the bill was genuine and properly payable by the drawee to the holder. The purchaser parts with his money at the time he acquires the legal title, which he claims the right of retaining. The holder, on the other hand, unless there are prior indorsers, gives up nothing of value at the time when he acquires from the drawee the money, which he seeks to keep. He parted with his money in a prior transaction, when he obtained the worthless bill. At that moment the loss has fallen upon the holder, and it has been said that he "ought not to be permitted to throw that loss upon another innocent man, who has done no act to mislead him." [2] But this view

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Bank *v.* Nassau Bank, 91 N. Y. 474. Analogous to these cases of forged indorsement are those where the defendant buys a stock certificate, transferred to him by a forged power of attorney, and then surrenders it to the company, taking out a new certificate in his own name. The title of the true owner is not affected thereby. The defendant, having obtained the new certificate by means of the original one of the true owner, holds the new one as a constructive trustee for the latter. The company would be bound to issue a fresh certificate to the true owner, but would of course be entitled to have the one outstanding, to which the original shareholder is equitably entitled, delivered up. So that the loss must fall on the innocent purchaser. Sims *v.* Anglo-Am. Co., 5 Q. B. D. 188; Metrop. Bank *v.* Meyer, 63 Md. 6. The case of Boston Co. *v.* Richardson, 135 Mass. 473, seems to have gone too far in holding the innocent purchaser liable on an implied warranty of title. The same criticism may be applied to Merchants' Bank *v.* First Bank, 3 Fed. Rep. 66, — a case of forged indorsement, — which was said in Leather Bank *v.* Merchants' Bank, 128 U. S. 26, 37, to proceed "upon grounds inconsistent with the principles and authorities above stated." In the last case the-drawee's right, to recover of the holder under a forged indorsement, was held to be barred in six years from the time of the payment. This decision, on the theory of subrogation, is clearly right. But, if the case is regarded as an illustration of the right to recover money paid under mistake, it is not to be reconciled with the prevailing doctrine, that the cause of action does not accrue against an innocent receiver until demand, or notice of the mistake.

[1] In 1 HARV. L. REV. 3, 4, *et seq.*

[2] Per Chambre, J., in Smith *v.* Mercer, 6 Taunt. 76, 84.

seems specious, rather than sound. From the point of view of natural justice, the time of the loss is immaterial.[1] If one looks at the fraudulent transaction in its entirety, the equality of the equities between the holder and the drawee is just as obvious as the equality of the equities between the purchaser and the equitable incumbrancer. One or two additional illustrations may be put: —

A creditor sells his claim to A, and afterwards, concealing this sale, sells the claim to B, who in good faith collects it of the debtor. B paid his money for nothing, but surely he ought to be allowed to keep what he has collected, although received after he suffered his loss, and although the loss is thereby thrown on the equally innocent A.[2]

Again: A third mortgagee buys the first mortgage in ignorance of the second. The second mortgagee, in justice, cannot prevent the third from tacking his two mortgages, although the second is thereby "squeezed out." [3]

Another example is found in the singular case of London Bank *v.* London Co.[4] Some negotiable bonds were stolen from the defendant's box and sold to the plaintiff, a *bona fide* purchaser. The thief, fearing detection, afterwards, by fraud, got them again from the plaintiff and replaced them in the box of the defendant, who did not learn till later of the theft or replacement of the bonds. The

[1] If, for instance, the money paid by the drawee to the holder should by mistake be repaid to the drawee, the latter could keep it. This happened in Second Bank *v.* Western Bank, 51 Md. 128, where the loss first fell on the holder, who bought a bill drawn without funds; the loss was then thrown upon the drawee by the latter's paying the bill by mistake; but was finally cast upon the holder by his mistake in refunding to the drawee.

[2] In Judson *v.* Corcoran, 17 How. 612, Catron, J., said, p. 614: "The case is one where an equity was successively assigned in a *chose in action* to two innocent persons, whose equities are equal, according to the moral rule governing a court of chancery. Here C. [the junior assignee] has drawn to his equity a legal title to the fund, which legal title J seeks to set aside. . . . Now, nothing is better settled than that this cannot be done. The equities being equal, the law must prevail." See to the same effect Mercantile Co. *v.* Corcoran, 1 Gray, 75; 40 Seuffert's Archiv, No. 103; 13 id. No. 246; 24 id. No. 234; 31 id. No. 27; 3 Stobbe, Handbuch d. deutschen Privatrechts, 181; Knorr, 42 Archiv für die Civilistische Praxis, 318. In Germany, as generally in the United States, the mere fact, that the second assignee first notifies the debtor of his assignment, does not defeat the precedence of the first assignee; but in France, as in England, priority of notice determines the rights of successive assignees.

[3] A wider generalization has convinced the writer that his opinion to the contrary in 1 HARV. L. REV. 15 is erroneous. But the English doctrine, which permits tacking by the third mortgagee, even when he has notice of the second mortgage, as in Taylor *v.* Russell (1891), 1 Ch. 8, seems as indefensible as ever. Such a case is hardly to be distinguished from the cases where the holder of a bill collects it with knowledge that it is forged, or drawn without funds, and that the drawee is acting under a mistake. *Supra*, p. 301, n. 2.

[4] 21 Q. B. Div. 535.

court gave judgment against the plaintiff, on the ground that the defendant was a purchaser for value without notice. It requires a considerable effort of the imagination to find here the elements of a purchase. But the decision seems clearly right, for the equities were equal, and the defendant had the bonds. Here, too, as in the preceding two instances, the loss, which first fell on the defendant, was afterwards transferred to the plaintiff.

The rule as to equal equities is also applicable, although the holder of the legal title parts with his money, neither before nor contemporaneously with its acquisition, but subsequently thereto. If, for example, a plaintiff pays and the defendant receives money, supposed by both to be due from the defendant, but really due from X, and the mistake is not discovered until the claim against X is barred by the Statute of Limitations, or has become worthless by the insolvency of X, the defendant can keep the money. The rule is the same, if the defendant's pecuniary position has become changed in other ways, in consequence of the receipt of the money. Here, again, both parties are innocent, and one of them must suffer; but the defendant, having the legal title to the money, prevails.[1]

It is hoped that what has been written may serve to convince the reader of the extensive scope of the doctrine that equity will not interfere as between two persons having equal equities, but will let the loss lie where it has fallen. It will certainly be a satisfaction to the writer, if he has helped to vindicate the opinion of Lord Mansfield in Price *v.* Neal from the false gloss that has been put upon it by his successors.

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[1] Brisbane *v.* Dacres, 5 Taunt. 144; Skyring *v.* Greenwood, 4 B. & C. 281; Watson *v.* Moore, 33 Law Times, 121; Union Ass'n *v.* Kehlor, 7 Mo. Ap. 150; Mayer *v.* State Bank, 8 Neb. 104, 109; Union Bank *v.* Sixth Bank, 43 N. Y. 452; Mayer *v.* Mayor, 63 N. Y. 253; White *v.* Continental Bank, 64 N. Y. 476; Curren *v.* Mayor, 79 N. Y. 511, 515; Beam *v.* Copeland, Texas, 14 S. W. R. 1094; Union Bank *v.* Ontario Bank, 24 Low. Can. Jur. 309; Pothier, Obligations, No. 256; 13 Duranton, Cours de Droit Français, § 685. The principle was clearly stated in Kingston Bank *v.* Eltinge, 40 N. Y. 391, but strangely misapplied, the court considering that the plaintiff had the legal title, although the money had been paid to the defendant by the plaintiff's consent. If land had been conveyed, instead of money, it it hardly to be supposed that the court would have treated the legal title as being in the plaintiff; but there is obviously no difference between the two cases in principle. Durrant *v.* Eccles. Commissioners, 6 Q. B. D. 234, is difficult to explain, unless, by reason of the relative positions in life of the parties, the defendant should be held responsible for the consequences of the mistake.